

‘ I have recommended that the court grant the motion of plaintiff Adam Mushero to represent a class of ‘[a]ll parents in the State of Maine who have or will have their federal income tax refunds offset under 42 U.S.C. ‘ 664 in order [to] pay the State of Maine debt for Aid to Families with Dependent Children that accrued pursuant to 19 M.R.S.A. ‘ 495 and that was or will be established pursuant to 19 M.R.S.A. ‘ 498.” Recommended Decision on Motion for Certification of Plaintiff Class at 2. References herein to ‘the plaintiff” or ‘Mushero” should be construed to encompass all class members if the court accepts my recommended decision on class certification.

and grant the motion of defendant H. Rollin Ives, sued in his official capacity as Commissioner of the Maine Department of Human Services ("DHS"), for judgment on the basis of a stipulated record.

I. STIPULATED RECORD

The stipulated facts, insofar as relevant to this decision, are as follows. The defendant is responsible for administering Maine's child-support enforcement program pursuant to Title IV-D of the Social Security Act. Stipulated Facts & 2. He also is responsible for collecting debts owed to DHS for AFDC pursuant to 19 M.R.S.A. ' 495. *Id.* AFDC debts accrue prior to the entry of any child-support order. *Id.* & 4. DHS collects both child-support and AFDC debts in part by intercepting federal income-tax refunds under 42 U.S.C. ' ' 654(18) and 664. *Id.*

Plaintiff Mushero was notified by letter dated February 14, 1989 that DHS would hold a hearing pursuant to 19 M.R.S.A. ' 498 to set a current child-support obligation and to establish his debt for AFDC paid to his two sons and their mother, Dawn L. Frasier. *Id.* & 5; Exh. A to Stipulated Facts. The hearing was held on April 12, 1989. Exh. B to Stipulated Facts. DHS thereafter issued a decision dated April 24, 1989 establishing a debt of \$2,696 for AFDC paid between April 19, 1988 and April 12, 1989.² *Id.*; Stipulated Facts & 6. DHS also set a current support obligation of \$42 per week per child -- the first time Mushero ever was ordered to pay child support. *Id.* The plaintiff appealed the decision pursuant to 19 M.R.S.A. ' 515; the appeal was denied by decision dated July 28, 1989. Stipulated Facts & 7; Exh. C to Stipulated Facts. Mushero married Frasier and moved in with his family on August 5, 1989. Stipulated Facts & 8. On that date, the AFDC grant closed. *Id.* & 9. The plaintiff now resides in Oakland, Maine, with his wife and three children. *Id.* & 1.

² Mushero's AFDC debt was calculated as the total amount of AFDC paid minus child-support payments he voluntarily made during the relevant period. Exh. B to Stipulated Facts at 6.

DHS advised Mushero by notice dated September 15, 1989 that it would seek to offset \$3,301 from his federal income-tax refund "`for past-due child support and/or spousal support." *Id.* & 10; Exh. D to Stipulated Facts. Of that amount, \$2,696 was for the AFDC debt. *Id.* & 11. Mushero appealed this decision pursuant to 19 M.R.S.A. ' 515; by order dated April 19, 1990, the appeal was denied except insofar as it upheld Mushero's claim that child-support arrearages did not accrue beyond August 5, 1989. Stipulated Facts && 12-13; Exh. E to Stipulated Facts. The entire amount of the plaintiff's federal tax refund for 1989, \$2,293.09, was intercepted and applied toward the plaintiff's AFDC debt and child-support arrearages. Stipulated Facts & 14; Exh. F. to Stipulated Facts. The intercepted funds were applied first toward the child-support arrearages and then toward reducing the AFDC debt. Stipulated Facts & 28.

Simultaneously with the filing of this lawsuit, the plaintiff filed an action in state court appealing DHS' action on state-law grounds. Plaintiff's Memorandum in Support of Motion for Judgment on a Stipulated Record ("Plaintiff's Memorandum") at 3. The state action has been stayed by agreement of the parties. *Id.* at 4.

II. LEGAL ANALYSIS

The plaintiff does not dispute DHS' right to intercept federal tax refunds for the purpose of reducing child-support arrearages. Plaintiff's Memorandum at 8. However, he contends that DHS contravenes federal law, specifically 42 U.S.C. ' 664, by intercepting federal refunds to reduce AFDC debt.³ He asserts that DHS thereby deprives him of his federal rights in violation of 42 U.S.C. ' 1983.

³ Secondly, the plaintiff contends that the debt itself is illegal and should not be collected by any means because it exceeds states' authority under 42 U.S.C. ' 656(a)(1) to collect only debts accruing under rights assigned to them. Plaintiff's Memorandum at 9.

He accordingly seeks relief in the form of a declaratory judgment, an injunction against continuation of the challenged practice, a return of his tax refund and reasonable attorney fees.

The plaintiff's complaint apparently presents a question of first impression in this and any other jurisdiction. The parties do not cite, and I am unable to find, any reported case challenging the validity of interception of federal tax refunds to satisfy AFDC debts. However, the parties cite bankruptcy cases in which courts faced a statutory question identical to that presented in the instant case.⁴ None of these cases issue from the First Circuit Court of Appeals.

Resolution of the instant lawsuit requires close reading of the interlocking federal and state statutes by whose authority DHS intercepts federal tax refunds. In undertaking this task, I am mindful of the factors the First Circuit deems relevant in determining congressional intent: (1) statutory language; (2) contemporaneous legislative history; (3) subsequent legislative history; and (4) agency interpretation. *See, e.g., Massachusetts v. Secretary of Health & Human Servs.*, 899 F.2d 53, 58 (1st Cir.), *petition for cert. filed*, 110 S.Ct. 3268 (1990).

Congress authorizes state agencies, such as DHS, to intercept federal tax refunds of debtors owing ``past-due support which has been assigned to such State pursuant to section 602(a)(26)" 42 U.S.C. ' 664(a)(1). For purposes of tax interception, Congress defines ``past-due support" as ``the amount of a delinquency, determined under a court order, or an order of an administrative

⁴ This question, discussed more fully below, is whether AFDC debts arise from child-support rights assigned to the state as a condition of receipt of AFDC. Obligations arising from such assigned rights are non-dischargeable in bankruptcy as well as collectible by interception of federal income-tax refunds. I have carefully reviewed all bankruptcy cases discussed by the parties but do not rely on them because they turn on construction of other states' laws.

process established under State law, for support and maintenance of a child, or of a child and the parent with whom the child is living." 42 U.S.C. ' 664(c)(1).

Mushero's AFDC debt fits the definition of "past-due support" in ' 664(c)(1). The debt was delinquent; it was established in April 1989 and remained unpaid when DHS sought tax-refund interception in September 1989. The debt was determined by administrative process -- Mushero's hearing pursuant to 19 M.R.S.A. ' 498. Finally, it was a debt for the support and maintenance of Frasier and her children. Support and maintenance of dependent children and their custodial parents is a core purpose of AFDC payments. *See, e.g.*, 42 U.S.C. ' 601. The single remaining question is whether the AFDC debt was "assigned" to the state pursuant to ' 602(a)(26). Clearly, if the AFDC debt did not stem from Frasier's assignment, it is not collectible by federal tax-refund intercept.

Section 602(a)(26) requires that an applicant for AFDC, as a condition of eligibility, "assign the State any rights to support from any other person such applicant may have (i) in his own behalf or in behalf of any other family member for whom the applicant is applying for or receiving aid, and (ii) which have accrued at the time such assignment is executed" Relatedly, Congress provides in 42 U.S.C. ' 656:

(a)(1) The support rights assigned to the State under section 602(a)(26) of this title . . . shall constitute an obligation owed to such State by the individual responsible for providing such support. . . .

(2) The amount of such obligation shall be --

(A) the amount specified in a court order which covers the assigned support rights, or

(B) if there is no court order, an amount determined by the State in accordance with a formula approved by the Secretary [of the Department of Health and Human Services]

Legislative history indicates that Congress never contemplated the precise question whether AFDC debt should be assessed against absent parents or collected by federal tax-refund intercept.

Nonetheless, Congress intended to give states significant flexibility in administering AFDC. *See* S. Rep. No. 1356, 93d Cong., 2d Sess., *reprinted* in 1974 U.S. Code Cong. & Admin. News 8133, 8138 ("[T]he Committee bill provides that the States would have maximum freedom to determine what services they will make available, the persons eligible . . . , the manner in which such services are provided, and any limitations or conditions on the receipt of such services.")

The plaintiff and the defendant agree that state law determines what "support rights" Dawn Frasier could assign. *See* Plaintiff's Memorandum at 6; Defendant's Memorandum in Support of Motion for Judgment on a Stipulated Record ("Defendant's Memorandum") at 4. At the time of assignment, Frasier's children possessed one right that their mother could assign -- their right to child support under 19 M.R.S.A. ' 442. Section 442 provides, in its entirety, that "[e]very man shall support his wife and his child."⁵ The right of Mushero's children to this support accrued at the moment of birth. Frasier assigned it to the state, by operation of statute, as a condition of receiving AFDC. 19 M.R.S.A. ' 512. Both federal law in ' 602(a)(26) and 656(a), and state law in ' 512, contemplate the assignment of support rights, not the assignment of preexisting judgments or obligations. *See, e.g., In re Stovall*, 721 F.2d 1133, 1135 (7th Cir. 1983) (In 42 U.S.C. ' 602(a)(26), "Congress intended the total support obligation to be assigned to the states.")

The plaintiff apparently concedes that Frasier assigned support rights but contends that ' 442 conferred only the right to establish a current-support order. Plaintiff's Memorandum at 11. To this end, the plaintiff offers two statutory-construction arguments. The first is unconvincing; the second powerful. The plaintiff first relies on a bankruptcy case from the Ninth Circuit Court of Appeals in

⁵ Concomitantly, ' 443 provides that "[e]very woman shall support her child; and her husband when in need."

contending that ' 442, a general statute, is controlled by specific statutes. *In re Ramirez*, 795 F.2d 1494 (9th Cir. 1986), *cert. denied*, 481 U.S. 1003 (1987). The *Ramirez* court held that general California statutes similar to ' ' 442-43 were displaced by a specific statute giving the custodial parent full responsibility for child support. *Id.* at 1497. The court hence held that the custodial parent possessed no child-support rights to assign to the state. *Id.* Mushero contends that, because Maine's specific statutes would accord Frasier no right to retroactive support, DHS possesses no such right. Plaintiff's Memorandum at 8, 11-14. The *Ramirez* case, however, is distinguishable. In Maine, no analogous specific statute confines child-support responsibility solely to the custodial parent. Specific Maine statutes cited by the plaintiff, Plaintiff's Memorandum at 11-14, implement, rather than control, ' ' 442-43. Conceptually, ' 495 is simply another means of implementing ' ' 442-43. It is coequal to, rather than controlled by, Maine's other specific support statutes. The fact that the state in other specific statutes chose not to impose retroactive support burdens, Plaintiff's Memorandum at 11-14, is irrelevant.

The plaintiff's second contention is compelling -- that the language of 19 M.R.S.A. ' 498 indicates that ' ' 442-43 confer only the right to establish a current-support order. Objection to Defendant's Motion for Judgment on a Stipulated Record and Reply to Defendant's Memorandum (``Plaintiff's Reply Memorandum'') at 8-9. Section 498 provides in relevant part that ``[i]f no court order of support exists, the department . . . may establish a periodic payment to satisfy the responsible parent's current support obligation under sections 442 and 443, establish the responsible parent's debt accrued under section 495, and establish the responsible parent's obligation to maintain health insurance coverage for any dependent children" I agree with the plaintiff that this language appears to sever AFDC debt from rights accruing under ' 442. Nonetheless, I feel constrained to defer to the opinion of the Maine Supreme Judicial Court (``Law Court'') that

[a]ll parents have a child support obligation enforceable under section 495 and 498. A father . . . owes a duty of support under 19 M.R.S.A. ' 442, and if AFDC payments are made on behalf of his child constituting necessary support for that child, he can be required to reimburse [DHS] for those payments

Wellman v. Department of Human Servs., 574 A.2d 879, 883 (Me. 1990). As the plaintiff points out, the Law Court in *Wellman* was not presented with the question whether AFDC debt stemmed from ' 442. Plaintiff's Reply Memorandum at 13-14; *Wellman*, 495 A.2d at 881-82. The Law Court was not asked, and did not purport, to construe the language of ' 498. Nonetheless, I consider this dictum a reliable indicator of how the Law Court would rule. *See, e.g., Cives Corp. v. American Elec. Power Co.*, 550 F. Supp. 1155, 1157 n.1 (D. Me. 1982) (in diversity action, Maine court's construction of Maine statute controlling, as matter of state law). Accordingly, I find that, under Maine law, AFDC debts arise from support rights under ' ' 442-43. DHS collected AFDC debt in accordance with federal law, specifically 42 U.S.C. ' 664.

Although I conclude that DHS collects AFDC debt in compliance with federal law, I sympathize with the plaintiff's complaints about the manner in which the department does so. *See* Plaintiff's Memorandum at 15-18; Plaintiff's Reply Memorandum at 7. Ten months elapsed between the time DHS began paying Frasier AFDC and the time it notified Mushero it would assess the debt against him. In the meantime, he accrued debt without being put on notice that he owed any child-support obligation. The amount of the monthly AFDC debt exceeded the amount eventually fixed as a current monthly support obligation.⁶ The state gained, at Mushero's expense, by deferring the determination of the child-support order and allowing AFDC debt to accumulate. The delay appears

⁶ 19 M.R.S.A. ' 495 rendered Mushero liable for the full AFDC payment of \$438 a month during the interim in which no support order existed. Exh. A to Stipulated Facts at 1. When the state eventually established a support order, the amount was lower than the AFDC debt -- \$84 per week, Exh. B to Stipulated Facts at 4, the equivalent by my calculation of \$364 a month.

inexcusable, given that Mushero never denied paternity and voluntarily paid child support while Frasier was receiving AFDC. Nonetheless, it cannot alter the legal outcome in this case.

Fortunately, as plaintiff Mushero observes, Congress in 1988 enacted legislation to tighten state timetables for establishing current-support orders. Plaintiff's Memorandum at 16-17; 42 U.S.C. ' 652(h). The Department of Health and Human Services issued regulations effective October 1, 1990 that require state agencies such as DHS, within 90 calendar days of locating an absent parent or establishing paternity, to (1) establish a current-support order, (2) complete the service of process necessary to establish such an order, or (3) document unsuccessful attempts to serve process. 54 Fed. Reg. 32286, 32310 (1989) (to be codified at 45 C.F.R. ' 303.4). The new regulations also require states to enforce support orders within 30 days of identifying delinquency unless service of process is necessary. *Id.* at 32310-11 (to be codified at 45 C.F.R. ' 303.6). Such expeditious action generally should preclude the use of federal tax-refund intercept, a tool that states cannot employ unless child-support payments have been delinquent for three months or longer. 45 C.F.R. ' 303.72.

III. CONCLUSION

For the foregoing reasons, I recommend that this court GRANT the defendant's motion, and DENY the plaintiff's motion, for judgment on the basis of a stipulated record.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. ' 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 24th day of January, 1991.

David M. Cohen
United States Magistrate Judge